

Qwest's service and jointly marketing Qwest's and its own local service in a single package, Ameritech is, in the first instance, inevitably creating the confusion among customers over Qwest's relationship with Ameritech that will assuredly cause many customers to believe that Qwest and Ameritech are affiliated or related and that this relationship itself enables Qwest to offer better service than AT&T and other long distance carriers. Indeed, Ameritech's description of the CompleteAccess program strongly suggests that such confusion will occur. Ameritech has stated that through arrangement with Qwest, it will be able to offer "a combined local and long distance package of services, available from a single source," and that this package will be "supported by a single customer service number."¹⁷

32. Further, by endorsing only Qwest's service and offering it in connection with Ameritech's own, Ameritech is implicitly or explicitly telling all local customers in its region that only Qwest offers service that is cost-effective or that satisfies some quality standard. Because the Alliance would artificially enhance Qwest's reputation and goodwill, the Alliance would diminish the goodwill of AT&T and other carriers. All the foregoing harm to AT&T's goodwill cannot, to say the least, be readily quantified.

33. This is particularly so because Ameritech would be promoting Qwest's service in a number of ways. It will do so when

¹⁷ Ameritech/Qwest Press Release (May 14, 1998).

it is contacted both by the large percentage of customers who move and order new service each year and by the even larger percentage that contact Ameritech with questions about service. Further, Ameritech will engage in outbound telemarketing in which its representatives telephone existing customers and urge them to switch to the joint Ameritech/Qwest service. The value of these efforts to Qwest is reflected in its "conservative estimate" that its alliance with U S West would generate \$100-\$200 million in additional annual revenues in the first year.¹⁸ In addition, as noted above, Qwest's CEO anticipates even larger gains from the Ameritech/Qwest alliance due to the fact that Ameritech serves significantly more customers than U S WEST.

34. Risks of Discriminatory Conduct and Costs of Monitoring.

Further, the Alliance will subject AT&T and carriers to the same risks of discrimination for which there is no adequate after-the-fact remedy that led first to the MFJ and then to § 271. In particular, Ameritech retains a monopoly over the exchange access services that are necessary for AT&T and all long distance carriers to originate and complete calls in Ameritech's territory, and Ameritech thus has the ability to discriminate in favor of select carriers in the pricing and provisioning of these bottleneck facilities. Because Ameritech receives a payment for each Qwest customer it obtains, the Ameritech/Qwest Alliance gives Ameritech

¹⁸ Qwest Press Conference Transcript, p. 3.

a clear financial incentive to do whatever it can to cause Qwest's services to be selected by as many customers as possible.

35. As noted above, discrimination in the provisioning of access services can be very subtle and difficult to detect. Telecommunications networks are extremely complex, and they are constantly evolving. This constant change and complexity means that wide ranges of discretion are built into the design, timing, and pricing of exchange access services offered by Ameritech. Because Ameritech has a stake and interest in Qwest's success, Ameritech will benefit from any abuse of this discretion that favors Qwest. Thus, Ameritech can increase the relative quality of Qwest's service by provisioning Qwest's circuits more quickly when that is competitively important; it can offer new access features to Qwest before it offers them to competing long distance carriers; and it can provide Qwest advanced notice of changes to its network that may require corresponding adjustments by Qwest and other long distance carriers. This type of discrimination is extraordinarily difficult to detect and even harder to prove. When it exists, but is not proven, AT&T and other long distance carriers obviously incur irreparable harm. And even if it never occurs (or occurs and is proven), long distance carriers would incur other costs because of the Ameritech/Qwest Alliance that Qwest would not incur and for which there is no remedy: i.e., the cost of monitoring Ameritech's behavior to protect against discrimination.

36. AT&T and other long distance carriers must also be vigilant against the potential for discrimination in the pricing of access services. Facially neutral tariffs can readily be designed to provide an advantage to a favored long distance carrier. For example, Ameritech can try to offer a discount on access services that is tied not to a long distance carrier's volume of business but to its growth in business. Such a tariff would plainly favor Qwest, who alone among long distance carriers can anticipate rapid growth in the coming months. The specter of such discrimination immediately imposes upon AT&T an obligation to monitor the access tariffs Ameritech files in five states.

37. Further, Ameritech can discriminate in pricing access services merely by giving Qwest advance notice of price changes, so that Qwest can adapt its own prices to the change more quickly than other carriers. Again, such discrimination would be nearly impossible to prove. Although AT&T and other long distance carriers might notice that Qwest was responding to price changes more quickly, they would be unable to prove that this was the result of discriminatory treatment.

38. But even if Ameritech never were to discriminate in favor of Qwest in any of the foregoing ways, their alliance causes undoubtable harm to AT&T and other long distance carriers who must immediately begin efforts to monitor Ameritech's behavior to detect discrimination, and must expend considerable resources attempting to prove discrimination where it is suspected. These injuries,

which will befall all long distance carriers except those paying a fee to Ameritech, are precisely the kinds of irreparable injuries that led to the MFJ and the ongoing in-region, interLATA restriction of section 271.

39. Delay of Effective Local Entry. Finally, the Ameritech/Qwest Alliance will delay the effective local entry of AT&T and other carriers who want to compete with Ameritech's local service, pursuant to §§ 251-53 of the Communications Act. In particular, because the requirements of these provisions are codified in the "competitive checklist" that must be satisfied before Ameritech can receive long distance authority under § 271, § 271's provisions should afford Ameritech and other BOCs with powerful incentives to implement the requirements and open their local markets to competition.

40. However, the Ameritech/Qwest Alliance allows Ameritech to profit from long distance services in other ways and thus diminishes or eliminates any incentive to open the local monopolies. Thus, the effect of the Alliance would be to delay the effective entry of AT&T and others and to force them to incur litigation and other costs to force Ameritech to comply with the new requirements of §§ 251-53. Here, too, the resulting harm to AT&T, other carriers, and the public interest cannot be readily calculated and is irreparable.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 14, 1998.


John A. McMaster

ATTACHMENT 4

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AT&T Corp., et al.,

Plaintiffs.

v.

US West Communications, Inc.,

Defendant.

NO. C98-634 WD

MEMORANDUM AMICUS CURIAE OF
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION IN
SUPPORT OF MOTION OF AT&T ET
AL. FOR A PRELIMINARY
INJUNCTION

I.

INTRODUCTION

The Washington Utilities and Transportation Commission (WUTC) is authorized by RCW 80.01.075 to appear before federal agency and court proceedings where the practices of regulated utilities affect the interests of the "general public" of the State of Washington. The arrangement between US West Communications, Inc. (US West), and Qwest Communications Corporation (Qwest), called the "Buyer's Advantage" program, is contrary to those interests. It violates the letter and the spirit of the Federal Telecommunications Act of 1996 (Federal Act), particularly sections 251(g) and 271, 47 U.S.C. §§251(g), 271, would delay the implementation

1 of federal state policies promoting competition in the local telecommunications market, and
2 would inject US West into the role of controlling various aspects of long distance service. We
3 file this memorandum *amicus curiae* to urge the Court to issue a preliminary injunction to halt
4 US West's implementation of its arrangement with Qwest.
5

6 II.

7 INTEREST OF AMICUS CURIAE WUTC

8 The WUTC under both state and federal law has a significant role in defining the terms
9 and conditions for opening up both the local telecommunications market and the long distance
10 market. For example, as this Court is aware, the WUTC has arbitrated numerous
11 interconnection agreements between US West and its potential competitors under which US
12 West will sell various elements of its network to interconnecting companies,¹ and is handling
13 several complaints arising out of those agreements. The WUTC also is charged with
14 determining whether a Bell operating company meets certain prerequisites for entering the long
15 distance market (generally having opened up its local market to competition) and with
16 recommending a decision to the FCC. 47 U.S.C. §271(d)(2)(B).² The WUTC enforces the
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20 ¹The Court should also be aware that every single one of the arbitrated agreements
21 involving US West have been challenged in this Court. See US West Communications, Inc. v.
22 MES Intelecom, Inc., et al., Ninth Circuit No. 98-35146 (Appeal of C97-222WD); US West
23 Communications, Inc. v. TCG Seattle, Inc., et al., Ninth Circuit No. 98-35203 (Appeal of C97-
24 354WD); US West Communications, Inc. v. AT&T of the Pacific Northwest, Inc., et al., No.
25 C97-1320R (Consolidated); MCI Telecommunications Corp. v. US West et al., No. C97-1508R
26 (Consolidated); US West Communications, Inc. v. Sprint Communications Co., L.P. et al., No.
C97-1764R; US West Communications, Inc. v. AT&T Wireless Services, Inc., No. C97-
3686(FDB)BJR.

²State commissions, like the WUTC, have other significant roles under the Act. E.g., 47
U.S.C. §214(e) (designation of "eligible telecommunications carriers" to receive universal

1 provisions of section 251 of the Telecommunications Act, including the equal access
2 provisions, as they pertain to intrastate telecommunications services. Moreover, pursuant to
3 RCW 80.36.300-.330, the WUTC is authorized to take measures to promote and advance
4 competition in telecommunications markets throughout the state. The WUTC is keenly
5 concerned with the issues presented in this case, which have broad implications not only for the
6 companies who are parties, but also for the residential and business consumers whose interests
7 the WUTC is directed to protect.

8 9 III.

10 ARGUMENT

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12 We do not repeat the arguments made by the plaintiffs AT&T and others. Rather, we
13 offer a broader perspective of a state regulatory agency charged by the Federal Act, and by state
14 law, with effecting pro-competitive policies. Depending on how this litigation progresses, we
15 may later seek leave to intervene to participate more in the factual development of the various
16 arguments.

17 18 A. The Overall Purpose of the Federal Act Is Undermined by the US West/Owest Arrangement.

19 Congress enacted the 1996 Act to promote competition in both the local and the long-
20 distance telecommunications markets. The Act reflects an acute understanding of the barriers
21 to competition that historically have existed and that continue to exist today. One of Congress'
22 primary concerns was the formidable dominance exercised by the "Bell operating companies,"
23 including US West, in the local market and the possibility that those companies might use that
24
25
26 service funds and to serve unserved areas).

1 dominance either to curtail competition in the long distance market or to unfairly leverage their
2 own entry into that market to their own advantage. To this end, Congress adopted a
3 comprehensive regulatory program designed to ensure the development of competitive markets
4 in a nondiscriminatory manner. US West's so-called "roaming" arrangement with Qwest
5 undermines both the letter and the spirit of the Act.
6

7 Section 271 expressly states, with only certain enumerated exceptions, that a Bell
8 operating company may provide in-region, long-distance ("interLATA") service only if its
9 application is approved by the Federal Communications Commission (FCC). Such approval
10 requires the Bell company to demonstrate the presence of a facilities-based competitor for its
11 local service (or show that all potential such providers have failed to request or timely
12 implement interconnection with the Bell Company). 47 U.S.C §271(c)(1). The Bell operating
13 company must also implement a comprehensive 14-item checklist designed to ensure that it has
14 opened up its local telecommunications market to competition, 47 U.S.C. §271(c)(2)(B), meet
15 the separate affiliate and nondiscrimination requirements of section 272, and show that its
16 application is consistent with the public interest.
17

18 US West has stated that it finds these requirements "cumbersome" and "frustrating."
19 Nonetheless, they serve an essential and laudatory purpose. They create, in effect, a quid pro
20 quo which simply provides that until US West has opened up its de facto monopoly in the local
21 market, it should not be permitted to enter, either directly or indirectly, the long distance
22 market. If US West is allowed to circumvent these requirements through "roaming
23 arrangements" with the long distance competitor or competitors of its choice, not only will US
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1 West profit from the lucrative long-distance market, but it will do so through the exercise of its
2 local monopoly muscle. Moreover, its incentive to open up its lock on the local market will be
3 reduced, a result that clearly is contrary to the Congressional will.² Congress envisioned the
4 Bell operating companies entering the long distance market on their own, with a variety of
5 competitive companies likewise entering the local market, all for the ultimate benefit of the
6 consumer.

7
8 US West, however, makes a series of technical arguments, attempting to demonstrate
9 that nevertheless the leasing arrangement is neither "the provision" of long distance services,
10 under 47 U.S.C. §271, nor discriminatory against long distance companies other than Qwest
11 under the "equal access" provisions of the Act, 47 U.S.C. §251(g). The parties' briefs parse the
12 words of these statutory provisions adequately, so we will not repeat those arguments. Rather,
13 as set forth below, we urge the Court to examine both these provisions together, from which it
14 is readily clear that the US West/Qwest arrangement thwarts the purpose of each.
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18 ²US West boldly contends that "in Washington . . . US West has never enjoyed a
19 monopoly" in the local, regulated telecommunications market. US West's Memorandum in
20 Opposition to AT&T's Motion for Temporary Restraining Order, or, in the Alternative,
21 Preliminary Injunction on an Expedited Basis (US West Mem.) at 16. The facts belie the claim.
22 In its recently concluded rate case, affirmed by the Washington Supreme Court, the
23 Commission expressly found that US West failed to demonstrate any effective price
24 constraining competition for any of its regulated services. US West Communications, Inc. v.
25 Washington Util. & Trans. Comm'n, 134 Wn.2d 74, 82, 949 P.2d 1337 (1997). US West has,
26 in fact, long enjoyed a *de facto* monopoly in this state.

US West also boasts of having spent "millions of dollars and countless to open its local
markets," and claims that it has "devoted thousands of hours and hundreds of its employees to
negotiating and implementing interconnection agreements." US West Mem. at 16. Once again,
this recitation is not consistent with the history of the Act's implementation. As previously
noted, *see supra* footnote 1, US West has appealed every WUTC-arbitrated interconnection to
this Court.

MEMORANDUM AMICUS CURIAE OF WUTC
IN SUPPORT OF MOTION OF AT&T FOR
PRELIMINARY INJUNCTION - 5

OFFICE OF THE ATTORNEY GENERAL
1400 B. Chapman Park Drive, SW
PO Box 40128
Olympia, WA 98504-0128
(360) 544-1182

1 **B. The US West/Qwest Arrangement Constitutes Provision of Long Distance Service**
2 **Contrary to the Parameters of Section 271 of the Act and Violates the Equal Access**
3 **Provisions Contained in Section 251(e) of the Act.**

4 The Court should consider sections 271 and 251(g) together, rather than parse the words
5 of each independently.

6 Looking first at the equal access issue, US West argues that it treats all long distance
7 carriers equally. If AT&T or a new entrant pays the same per customer service charge that
8 Qwest pays and agrees to offer the service long distance at the price that US West has
9 established as the "Buyer's Advantage" price, 10 cents a minute for interstate calls and 12 cents
10 a minute for intrastate calls, anytime, then, like Qwest, they can be part of the "team."

11 But the requirement that US West treat all interexchange carriers equally must be read
12 in the context of the competitive market for such companies. Congress envisioned a long
13 distance market much like the one we have now, but with more competitors and more options
14 for services and rates for the benefit of consumers. Congress did not envision that competitors
15 in the long distance market would offer cloned services with identical rates, with Bell operating
16 companies doing the cloning. They clearly did not envision numerous (theoretically all) long
17 distance companies offering the "Buyer's Advantage" rates as established by US West.

18 Even assuming that some marketing activity is allowed under section 271, the equal
19 access requirements would require that the long distance carriers have access to that marketing
20 service, for whatever service, and at whatever terms and rates, the long distance carrier seeks
21 to provide. Here, Qwest and US West apparently worked out a rate package, apparently fitting
22 what Qwest saw as its market niche. But a new market entrant may not have that same
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26 what Qwest saw as its market niche. But a new market entrant may not have that same

1 competitive strategy. Though Qwest's package of rates may be enticing to some customers,⁴ a
2 startup long distance company, for example, may wish to offer a package of 8 cents a minute
3 calling on evenings and weekends and 12 cents a minute during the day as an alternative. If it
4 does, however, it cannot have access to US West's marketing service. It must seek its market
5 niche without access to a powerful local ally. True equality would allow competitors "access"
6 to a marketer at the terms of the long distance company, not on the terms of the monopoly local
7 provider. This is already the case with respect to billing and collection services. US West
8 offers to provide billing and collection services to all carriers in a nondiscriminatory fashion
9 and without any attempt to dictate the rates and terms of each carriers long distance services.
10

11 But let's assume, hypothetically, that US West's argument is valid: all companies can
12 and may some day participate in the Buyers' Advantage program. At that point, US West,
13 through its dominance in the local market, also controls substantially the pricing in the long
14 distance market. It no longer is just "marketing" long distance service. It is setting the terms
15 and conditions for such service. And US West's setting of those terms should be construed as
16 containing enough of the elements involved in the "provision" of service to run afoul of section
17 271.
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22 ⁴However, we note that if a customer goes directly to Qwest, he or she would pay 10
23 cents a minute for instate calls as well as long distance calls, compared to 12 cents if the
24 customer enrolls through US West's marketing program. See Product 169 on Price List No. 1,
25 attached as Appendix A to this memorandum. Moreover, Qwest's US West charge is rounded
26 up to the next full minute, while its own charge is not. Apparently, the "buyer's advantage" is
even greater if he or she resists US West's marketing efforts and proceeds to deal with Qwest
directly. US West's effort to drive the market is not necessarily in a direction that benefits
consumers.

1 US West's consultant Robert Crandall opines that US West's teaming arrangement
2 "does not constitute InterLATA market entry," Declaration of Robert W. Crandall (Crandall
3 Decl.) at 5, noting that "US West informs me that these fees only cover its marketing costs."
4 We question whether that statement is in fact true (or, perhaps more accurately, under what
5 accounting assumptions that statement is true). We doubt if in fact the incremental costs to US
6 West for its marketing equals the revenues from the Qwest promotion. We would expect, as
7 discovery progresses in this case, that in fact US West will receive some benefit from the
8 teaming arrangement. These benefits could include revenue above and beyond its costs,
9 thereby extracting some of the profits that otherwise would go to Qwest, and a more solid
10 toehold in the local market. With this teaming, US West would be able to offer one-stop
11 shopping on a scale that no potential local market entrant could do.

14 All this is simply contrary to the thrust of the Act. No doubt Congress intended that one
15 day the Bell operating companies would be offering one-stop shopping for both long distance
16 and local service. However, that futuristic vision included a competitive local market with
17 other competitors also offering packaged service. The US West/Qwest arrangement
18 undermines that competitive future.

20 C. The US West/Qwest Arrangement Is Not in the Consumers' Interest.

21 US West argues that issuing a preliminary injunction would be "contrary to the public
22 interest," US West Mem. at 10, citing the fact that 100,000 customers have joined the program.
23 We concur that the long distance market could benefit from another provider of service,
24 offering more choices to the consumers. However, even if 100,000 consumers have signed up
25

1 for the service through US West, that does not mean it is in the public interest. As noted in
2 footnote 4, the "Buyer's Advantage" is not the best deal around. A US West local customer
3 signing up with Qwest on his or her own would get a better rate. But more importantly, as
4 argued above and in the memorandum of AT&T, whatever short term benefits may accrue to
5 some subset of the 100,000 does not outweigh the damage to the procompetitive policies of the
6 1996 Act and the two million customers of US West who stand to benefit from more
7 competitive local and long distance services. Congress did not intend for US West to be able to
8 indirectly gain access to the lucrative long-distance market, nor to use its local monopoly power
9 to leverage the long-distance market, until it has opened its local monopoly through the
10 carefully crafted mechanism set forth in Section 271. The court should not be misled into
11 thinking that the "Buyer's Advantage" will necessarily serve the long term interest of the
12 consumer.
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15 IV.

16 CONCLUSION

17 For the reasons set forth above, the WUTC urges this Court to grant the motion for a
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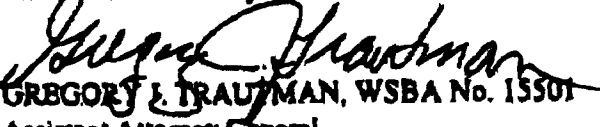
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1 preliminary injunction filed by AT&T, and permit the parties to develop the factual record
2 more thoroughly through expedited discovery.

3 Dated this 29th day of May, 1998.

4 CHRISTINE O. GREGOIRE
5 Attorney General

6 
7 JEFFREY D. GOLTZ, WSBA No. 5640
8 Sr. Assistant Attorney General

9 
10 GREGORY J. TRAUTMAN, WSBA No. 15501
11 Assistant Attorney General
12 Counsel for Amicus Curiae Washington
13 Utilities & Transportation Commission

14 1400 S. Evergreen Park Dr. SW
15 Olympia, WA 98504-0128
16 (360) 664-1186
17
18
19
20
21
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23
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25
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Qwest Communications Corporation
Price List No. 1

D. SERVICE OFFERINGS AND RATES (Continued)

49. Product 421

Product 421 is residential calling card service. Customers subscribe to the service through an authorized representative of the Company. Access to the service is accomplished by dialing a toll-free number and entering a valid personal identification code. Service is provided at a rate of \$.20 per minute. All calls are timed and billed in sixty (60) second increments. A monthly recurring charge of \$1.00 per customer is also applicable. Directory Assistance Service is provided at a rate of \$.65 per call.

50. Product 422

Product 422 is a calling card service designed for residential users. Customers access the service by dialing a toll free number and entering a valid account number. Customers subscribe to the service through an authorized representative. Intrastate service is provided at a rate of \$.30 per minute. All calls are timed and billed in sixty (60) second increments. Directory Assistance Service is provided at a rate of \$.65 per call. A charge of \$.30 per call is applicable to all calls placed using this service.

51. Product 438

Product 438 enables users of cellular or Personal Communications Services (PCS) telephones to place intrastate long distance calls. The Customer may subscribe to this service either through an authorized representative of the Company or by contacting the Company directly. The Company is not responsible if communications cannot be established or maintained due to Cellular Access or PCS Access or because of adverse atmospheric or other like limitations. Service is provided at a rate of \$.15 per minute. All calls are timed in sixty (60) second increments. Directory Assistance service is provided at a rate of \$.75 per call.

52. Product 169

Product 169 is an outbound direct dial service designed for residential users. Customers subscribe to the service through an authorized representative of the Company. This service is only available in locations where equal access has been implemented by the local exchange carrier. Service is provided a rate of \$.10 per minute. All calls are timed and billed for an initial period of sixty (60) seconds, usage thereafter is timed and billed in six (6) second increments. Directory Assistance Service is provided at a rate of \$.75 per call.

All Material Shown on this Page Is New.